

AMERICAN CENTRAL GAS COMPANIES, INC.

IBLA 97-538

Decided June 4, 2002

Appeal from a decision of the Deputy Commissioner of Indian Affairs denying an appeal of an order issued by the Minerals Management Service assessing late payment interest charges. MMS-95-0099-IND.

Affirmed.

1. Federal Oil and Gas Royalty Management Act of 1982: Royalties—Oil and Gas Leases: Royalties: Interest

Collection of interest for either the late payment or the underpayment of royalty is mandatory under both the Debt Collection Act, 31 U.S.C. § 3717(a)(1) (1994), and the Federal Oil and Gas Royalty Management Act of 1982, 30 U.S.C. § 1721(a) (1994).

APPEARANCES: Mark Williams, Systems Accountant, for American Central Gas Companies, Inc.; Howard W. Chalker, Esq., and Peter J. Schaumberg, Esq., Office of the Solicitor, Washington, D.C., for the Department of the Interior.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

American Central Gas Companies, Inc. (American Central), has appealed from a decision of the Deputy Commissioner of Indian Affairs, Bureau of Indian Affairs (BIA), dated June 23, 1997, denying its appeal of a January 10, 1995, order issued by the Minerals Management Service (MMS) assessing \$5,423.83 in late payment interest with respect to various oil and gas leases for Indian allotted lands, for the period from September 1986 through December 1990. We affirm.

The instant appeal is an outgrowth of class-action litigation between certain Indian allottees and the Department of the Interior concerning the latter's compliance with various terms and provisions of the Federal Oil and Gas Royalty Management Act of 1982 (FOGRMA), 30 U.S.C. §§ 1701-1757 (1994). This litigation culminated in a settlement agreement, styled Kauley v. Lujan, Civ. No. 84-3306T [hereinafter the "Kauley Settlement"], which was signed by the parties to the litigation in September 1991 and approved by the United States District Court for the Western District of Oklahoma on December 5, 1991. See David Kauley v. United States of

America, No. CIV-84-3306-T (W.D.Okla., filed Dec. 6, 1991). 1/ The upshot of the Kauley Settlement was that the Department agreed, inter alia, to "major portion" 2/ analyses of Indian royalty payments pursuant to a specific methodology therein delineated. See Kauley Settlement at ¶ 19.

By letter dated September 22, 1992, American Central was notified of the terms of the Kauley Settlement and informed that MMS had run a "major portion" analysis of appellant's leases which had disclosed a potential underpayment of royalties in the amount of \$7,228.31. American Central was provided with an opportunity to review the MMS calculations and challenge any items as it deemed warranted. MMS also noted that appellant could, if it so desired, tender payment of these underpaid royalties without awaiting a formal demand letter from MMS, though it was also noted that, if this course of action were pursued, "[t]he MMS' appropriate late payment charges will be computed and billed to you upon receipt of the payment of additional royalties." Letter dated September 22, 1992, at 2.

It is clear from the record before the Board that, notwithstanding any misgivings which American Central may have had, on September 7, 1993, it paid the assessment, as refined by MMS in a July 28, 1993, order to pay

1/ While, as indicated in the text, the order by the District Court adopting the Kauley Settlement was captioned as Kauley v. United States rather than Kauley v. Lujan, which is the actual caption of the settlement agreement, Board decisions have traditionally referred to the case as Kauley v. Lujan. See, e.g., Sanguine Limited, 155 IBLA 277, 278 (2001); Phillips Petroleum Co., 152 IBLA 109, 114 (2000); Burlington Resources Oil & Gas Co., 151 IBLA 144, 156 (1999).

2/ The calculation is described as a "major portion" analysis because it was based on provisions of the regulations (see, e.g., 30 CFR 206.152(a)(3)(i) and 206.153(a)(3)(i) (1991)) which provided that:

"For any Indian leases which provide that the Secretary may consider the highest price paid or offered for a major portion of production (major portion) in determining the value of production for royalty purposes, if data are available to compute a major portion, MMS will, where practicable, compare the value determined in accordance with this section with the major portion. The value to be used in determining the value of production for royalty purposes shall be the higher of these two values."

The term "major portion" was, itself, defined as "the highest price offered at the time of production for the major portion of gas production from the same field. The major portion will be calculated using like-quality gas sold under arm's-length contracts from the same field (or, if necessary to obtain a reasonable sample, from the same area) for each month." 30 CFR 206.152(a)(3)(ii) (1991). See generally, Burlington Resources Oil & Gas Co., *supra* at 156-59.

We note that the leases involved herein specifically referenced the authority of the Secretary to require that royalties be paid based on the highest price received for "the major portion" of production from the same field. See Allotted Indian Lands Lease form at ¶ 3(c).

additional royalties. ^{3/} American Central did not, in any way, challenge either the propriety or the amount of the recalculation of royalties. Thereafter, MMS prepared a supplemental invoice aimed at recovering late charges on those payments.

On January 10, 1995, MMS sent a Bill for Collection of the late payment charges, totalling \$5,423.83. By letter dated February 2, 1995, American Central filed an appeal with respect to the late payment charges, essentially arguing that, since American Central had no knowledge that any additional royalties were due until it received the September 22, 1992, letter from MMS, it was inequitable that American Central should be charged interest for the any period of time prior thereto. See Letter dated February 7, 1995, at 1-2. Further, American Central contended that, since it had diligently complied with MMS' subsequent payment requests, no late payment charges should be applied for any period of time involved. Id. ^{4/}

As noted above, by decision dated June 23, 1997, the Deputy Commissioner of Indian Affairs denied American Central's appeal. The Deputy Commissioner argued that it was MMS' "legal obligation" to assess interest for late royalty payments, pointing out that section 111(a) of FOGDRA, 30 U.S.C. § 1721 (1994), expressly provided that "where royalty payments are not received by the Secretary on the date that such payments are due, * * * the Secretary shall charge interest on such late payments" (emphasis supplied). Decision at 2. The Deputy Commissioner suggested that this obligation was especially operative where, as here, the late payment is made to an Indian lessor for whom the Federal Government has a trust responsibility. Id. at 3.

The Deputy Commissioner also emphasized the fact that the purpose of the interest assessment is not to penalize the lessee for tardy payment of the royalty but rather to make the lessor whole by compensating the lessor for the lost time-value of the money that had not been timely tendered. Id. at 3-4. Thus, even if it were true that there had been no culpability on appellant's part in timely tendering the correct royalty, this was irrelevant to the question of whether interest was properly assessed. Id. Based on the foregoing analysis, the Deputy Commissioner affirmed the MMS decision and American Central then pursued the instant appeal to the Board.

Before the Board, American Central reiterates the arguments which it pressed before the Deputy Commissioner. Thus, American Central claims that

^{3/} The amount assessed in the July 28, 1993, order was \$7,248.62.

^{4/} We note that, before the Deputy Commissioner, appellant also suggested that the original reassessment of royalty due was, itself, improper. See Letter of February 7, 1995, at 2-3. However, inasmuch as appellant chose to pay that assessment without disputing it, even though afforded the opportunity to do so, appellant was collaterally estopped from challenging its correctness in subsequent proceedings. See, e.g., State of Alaska, Department of Transportation and Public Facilities, 140 IBLA 205, 211 (1997); Lasmo Oil & Gas, Inc., 136 IBLA 389, 393 (1996); Keith Rush d/b/a Rush's Lakeview Ranch, 125 IBLA 346, 351 (1993). In any event, appellant does not advance this argument within the confines of the instant appeal.

it is inequitable to charge it with interest on underpayments which it asserts it had no reason to know existed until well after the fact. However compelling such an argument might be if, in fact, MMS was assessing a penalty for late payment of royalties, it is simply beside the point insofar as assessment of interest is concerned.

[1] As the Deputy Commissioner noted, interest is not assessed to penalize a party for late payment of the full and complete royalty. Rather, it is assessed to compensate the lessor for the loss of the time value of the money which should have been paid earlier. See, e.g., Linmar Petroleum Co., 153 IBLA 99, 108 (2000); Oryx Energy Co., 137 IBLA 183-84 (1996); Dugan Production Corp., 111 IBLA 181, 184 (1989); Peabody Coal Co., 72 IBLA 337, 348 (1983). Appellant had the use of the amount of the underpayment during the entire period from the sale of the natural gas until the proper royalty payment was made. Imposition of interest merely compensates the lessor, in this case the Indian allottees, for that value and puts them in the position they would have been had full payment been timely tendered. See Utah International, Inc., 107 IBLA 217, 221 (1989).

The foregoing considerations, which apply generally to all debts owed to the Government, have a particular resonance with respect to the instant case for two discrete reasons. First of all, the case involves the late payment of oil and gas royalties and, thus, is directly controlled by FOGRMA. In FOGRMA, Congress directed that "the Secretary shall charge interest on such late payments or underpayments at the rate applicable under section 6621 of Title 26." 30 U.S.C. § 1721(a) (1994) (emphasis supplied). This is clearly a mandatory direction, imposing upon the Secretary the obligation to charge interest in such circumstances.

Admittedly, there have been a handful of Board decisions which, in discussing the applicability of the Department's regulations implementing this provision of FOGRMA, have suggested that there might be situations in which interest could be waived. See, e.g., Colowyo Coal Company L.P., 154 IBLA 31, 36 (2000); Cotton Petroleum Corp., 112 IBLA 1, 2-3 (1989); Cities Service Oil & Gas Corp., 104 IBLA 291, 293-94 (1988). These discussions, have been based on comments made in the adoption of the Department's regulations (see 30 CFR 218.54) implementing FOGRMA. In particular, various appellants have pointed to language appearing in the preamble to the regulations where, in response to an inquiry by one commentator as to liability for interest assessments where the payee was not at fault in the original underpayment, MMS replied that "[i]f a late payment or underpayment is not the fault [of] the lessee in the judgment of MMS, assessment of interest will be waived." 49 FR 37340 (September 21, 1984).

It is interesting to note that, while the above cases discussed the possibility that interest assessments might be waived in the appropriate circumstances, none of the decisions actually waived the collection of interest for a late payment. On the contrary, they all affirmed decisions of MMS that, where a late payment or an underpayment of royalty had occurred, interest was properly assessed. In any event, it is our view that, notwithstanding the language appearing in the preamble, MMS lacks authority to waive interest assessment where a royalty payment is late.

Not only does the language of the regulatory preamble insert an issue of culpability into an area in which the real concern is merely to make the Government whole, the approach advocated by the preamble runs afoul not only of the actual language of FOGPMA but of the Debt Collection Act of 1982 (DCA), 31 U.S.C. § 3717(a)(1) (1994), as well. Indeed, even without FOGPMA, the Department would be required by the DCA to assess interest on late payments and underpayments, regardless of any culpability on the part of the lessee. See, e.g., Amax Land Co. v. Quarterman, 181 F.3d 1356, 1362 (D.C. Cir. 1999) ("That statute 'changed the common law' by making mandatory the federal government's common law right to assess interest on private persons' overdue obligations to the government").

Moreover, regardless of what the preamble stated was the "intent" of MMS in adopting 30 CFR 218.54, the actual language of the regulation provides no basis for waiver. Thus, 30 CFR 218.54(a) simply states that "[a]n interest charge shall be assessed on unpaid and underpaid amounts from the date the amounts are due." Nothing in 30 CFR 218.54 can fairly be said to modify this declaration and, to the extent that the preamble might be read as contradicting this requirement, we merely note that, where there is a conflict between the text of a regulation and the preamble discussion of the regulation's import, it is the text of the regulation which controls. See BHP Minerals International, Inc., 139 IBLA 269, 310 (1997); W. W. Priest, 55 IBLA 398, 400 (1981).

Finally, what must not be forgotten is that this case involves late payments of royalties to Indian allottees. Even if it could be conceded that there might exist some situations in which the Federal Government could elect not to collect interest on past due royalties, it could not, consistent with its fiduciary obligations, do so with respect to royalties payable to Indian allottees. See, e.g., Peabody Coal Co., supra. Thus, the decision of the Deputy Commissioner herein was clearly correct.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

James L. Burski
Administrative Judge

I concur:

Gail M. Frazier
Administrative Judge